

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



74-1827

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**United States Court of Appeals**

For the Second Circuit.

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THE UNITED STATES

*Appellees,*

vs.

PEDRO MORELL and RAMON BRUZON

*Appellants.*

On appeal from the United States District Court  
For The Eastern District of New York

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**Appellants' Brief**

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GEORGE L. SANTANGELO  
*Attorney for Appellant, Bruzon*  
Office & P.O. Address  
253 Broadway  
New York, N.Y. 10007  
212-267-4488

SLOTNICK & NARRAL  
*Attorney for Appellant, Morell*  
15 Park Row  
New York, N.Y. 10018  
BE 3-5390

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## RELEVANT STATUTES

### 18 U.S.C. Section 3109

#### 3109. Breaking doors or windows for entry or exit

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

### 21 U.S.C. Section 879

#### 879. Search warrants

(a) A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.

(b) Any officer authorized to execute a search warrant relating to offenses involving controlled substances the penalty for which is imprisonment for more than one year may, without notice of his authority and purpose, break open an outer or inner door or window of a building, or any part of the building, or anything therein, if the judge or United States magistrate issuing the warrant (1) is satisfied that there is probable cause to believe that (A) the property sought may and, if such notice is given, will be easily and quickly destroyed or disposed of, or (B) the giving of such notice will immediately endanger the life or safety of the executing officer or another person, and (2) has included in the warrant a direction that the officer executing it shall not be required to give such notice. Any officer acting under such warrant, shall, as soon as practicable after entering the premises, identify himself and give the reasons and authority for his entrance upon the premises.

QUESTIONS PRESENTED

1. Whether the failure of the Government to turn over the details of their main witness's arrest, plea and sentence deprived the defendants of a fair trial.
2. Whether the prosecutor's summation was so improper and testimonial in nature as to prejudice the defendants' rights to a fair trial.
3. Whether a warrantless search of the defendants' store made after entry to the premises was gained without prior notice of the agents' purpose and authority requires suppression of the narcotics seized.
4. Whether the Government's failure to identify, produce or disclose the whereabouts of a confidential informer who participated in the alleged conspiracy requires a new trial.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA,

-against-

PEDRO MORELL and RAMON BRUZON,

Defendants.  
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PRELIMINARY STATEMENT

This is an appeal from judgments of conviction rendered against the defendants, Pedro Morell and Ramon Bruzon, in the United States District Court for the Eastern District of New York, (Costantino, J.) on May 10, 1974 convicting them of conspiracy to distribute a Schedule II controlled substance, cocaine, and possession with intent to distribute cocaine. (Title 21, U.S.C. Sections 846 and 841(a)(1)). Both defendants were sentenced to a term of eight years imprisonment and a special parole term of five years.

STATEMENT

The Trial

The Government's Case

Trial before a jury began on March 5, 1974 and concluded on March 7, 1974 with a verdict of guilty on both counts of the indictment. <sup>1</sup>

1. The trial resulting in the guilty verdict commenced one day subsequent to a mis-trial that occurred on March 4, 1974. The first trial had commenced on February 27, 1974 and had proceeded through the Government's case and part of the defense case. The pertinent transcript of the first trial is included in the appendix herein from pages 1 through 281 of Volume 1. (Numerical references are to pages of the trial transcript contained in Volume 1 of the appendix.)

The Government presented two witnesses at the trial to demonstrate the alleged conspiracy and substantive offense.

The first witness, Alfredo Valdez, commenced working as a paid undercover agent for the United States Government some time after his 1969 arrest in Florida for possession of cocaine. He testified that during the latter part of April, 1972, he was introduced to the defendants, Morell and Bruzon, by a man named Louie whose last name he did not know, whose address he did not know, who was not mentioned in any Government report and whom he could have met in a bar in the street or in a TV store. (368-378). Valdez, at the time, was a paid informant who was paid by the Government depending upon how much time he spent on the case and on the "quantity of the package" seized by the Government. (318-319). Valdez was allegedly told by Pedro and Ramon after their introduction by Louie that they expected a shipment of about 10 kilos of cocaine from Columbia, South America. According to Valdez, he was given a green or white card which had the address of a store located at 31st Avenue in Queens, New York between 90th and 91st Streets. During three or four visits to the store, between April and May 25, 1972, he asked the defendants whether the cocaine had arrived and attempted to determine the price. The cocaine, however, had not yet arrived and the defendants did not know the price at that time. On May 23, 1972, Valdez said he received a call from Ramon who told him "I got the paint for you",

and that the price was about "twelve-fifty". Bruzon and Valdez then met the next night in the Escorial Bar around 11 o'clock where Valdez was told that four kilos of cocaine were available at \$12,500.00 per kilo. (320-335). On the evening of the 24th, Valdez said he called Agent Gene McElroy<sup>2</sup> and after speaking to him, proceeded to Morell's house at approximately 1:00 A.M. in the morning where an appointment was made to meet in the store the next day, May 25, 1972, between 4:00 P.M. and 6:00 P.M. to conclude the purchase of the cocaine. (332-340). During the morning of May 25, 1972, Valdez met with Agent McElroy at his apartment which was searched and at approximately 2:00 P.M., Agent McElroy and other agents met with Valdez and gave him \$48,000.00 of Government funds in a suitcase which was placed in Valdez' car. (341-343).

At approximately 4:00 P.M. that day, Valdez, together with approximately 10 agents, arrived at 90-19 31st Avenue, Queens, New York. Morell opened the door; Valdez asked "where is Ramon" and was told that Bruzon was downstairs in the basement. Valdez found Bruzon sitting in the basement mixing the cocaine with "cut" which mixing took approximately between 30 and 40 minutes. After the mixture was prepared, Valdez returned to his car and removed from the trunk the suitcase containing the money. The removal of the suitcase was a prearranged signal that Valdez had seen the cocaine. (342-345). According to Valdez, Pedro had walked with him

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2. Agent McElroy was the case agent who assisted in the trial of this case at the U.S. Attorney's table. Agent McElroy did not testify.

to the car and as they walked to the door of the premises, the agents came into the store, arrested Morell and pretended to arrest Valdez. Valdez then said "God damn it" which was another prearranged signal indicating that the cocaine was in the basement whereupon agents proceeded downstairs and arrested the defendant, Bruzon.

Supervising Agent Jeffrey Scharlatt was one of the 10 agents assigned to make the arrest and seizure on that day. He followed Valdez and other agents into the store and went down the stairs to the basement behind at least two and possibly three other agents. He observed Bruzon running towards the back door. After someone shouted "Stop! Police," Bruzon stopped and was arrested by other agents on the stairs leading to the backyard. Scharlatt turned to go back up the stairs to the first floor and saw a shopping bag together with plastic bags containing white powder under a hammock in the area near the stairway. He identified a photograph (Government's Exhibit 1), which was taken at the scene which depicted the plastic bags and white powder spilled on the floor. Those items were seized and introduced into evidence against the defendants.<sup>3</sup> (417-427).

#### Cross Examination of Valdez

Valdez' credibility was assailed on cross-examination with regard to five significant factors pertaining to his testimony.

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3. The defendants moved, prior to trial, for suppression of this evidence and the Court conducted a hearing which is discussed at pages of this brief and in point III of the argument herein.

1. On direct examination, Valdez had stated that in May of 1972, there were no pending charges against him in any court nor were there any pending charges against him at the time he gave his testimony.<sup>4</sup> (349).

On cross-examination, it was established that Valdez had been arrested in December of 1969 for possession of cocaine (1 kilo) which was valued at \$10,000. At the time Valdez did not use cocaine nor did he ever use it. In May of 1970, he pleaded guilty but made no deal with anyone with respect to that plea. He did not remember when he was sentenced but believed that it was sometime in 1971. Valdez did not know whether the judge who sentenced him was informed that he was cooperating with the Federal Government. The sentence of the Court, according to Valdez, was three years probation. (353-360).

Prior to Valdez' taking the stand on March 5, 1974, defense counsel requested "written formal material of the arrest record of Valdez, of the deal in Florida". The Government replied "we have no arrest record in our possession and the incident took place two years ago." When reminded that the information would be in the possession of the United States Attorney in Florida, the Government contended that it was not in the possession of the United States Attorney for the Eastern District and, therefore, not available to counsel. The trial court sustained the Government's position. (288-289).

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4. The only promise Valdez admitted to was the promise of money if there were an arrest and seizure in this case which money was paid to him (\$1,500.) in June of 1972 at his home.

2. According to Valdez, Louie told him in the presence of the defendants that "these are two guys. They deal big business - these two guys, Pedro and Ramon, are in business and you can talk to them and after what you do, I know nothing." The business Louie was talking about was selling cocaine. At the same spot on the street with Louie there, Pedro and Ramon told Valdez that they expected a shipment of ten kilos of cocaine. (322-324). On cross-examination, Valdez did not know Louie's last name, did not know where Louie lived, did not know where he was at the time of trial, did not know whether he had a wife, did not know where he came from, recanted his testimony at the prior trial that he had met Louie in a bar and finally admitted that he did not remember where he had met Louie for the first time. (321-324, 367-376).

Counsel requested information in the possession of the Government whether Louie existed and the United States Attorney, referring to Louie as a confidential informer, refused to either produce him, disclose his whereabouts, or grant an interview on the ground that he was not a participant or a witness to any transaction in the case. Defense counsel requested the above information under the authority of Roviaro v. United States but the trial court sustained the Government's position. (267-268).

3. In an effort to demonstrate that Valdez, while working for the Government, was a narcotic dealer for himself, the defendants established, on cross-examination that Valdez, in 1972, owned a car, paid rent of \$180

per month for a two room apartment in Queens, and reported only \$6,000 as income for that year which included the \$1,500 given to him as payment for this case which \$1,500 Valdez gave to his father in cash to hold for him thereby leaving him only \$4,500 per year to live. He contended that he worked odd jobs but when asked to name one job that he had, he was unable to. (363-367).

4. On June 15, 1972, Valdez signed a statement witnessed by Agent McElroy. Contrary to his direct testimony that (a) he was told the cocaine was available through a phone call from Bruzon on May 23 and (b) when he arrived at the store on the 25th of May, he saw Morell upstairs, Bruzon downstairs and (c) Morell never went down to the basement, the statement related the events as follows: (1) he was told the cocaine was available on the 24th by Morell at the store; <sup>5</sup> (2) he called Bruzon to talk about the cocaine; (3) both Morell and Bruzon were upstairs when he arrived at the store on the 25th; and (4) Morell and Bruzon brought him down to the basement. The statement concluded that "no threats or promises of reward have been made to me and this statement is fully and voluntarily given" although after he signed the statement, Valdez was paid \$1,500 by Agent McElroy at his home. (406-413).

5. Valdez testified that Bruzon mixed cocaine for approximately 30 minutes but no traces of it were observed by Agent Scharlatt on Bruzon's

5. Valdez also denied being at the store on the 24th in his testimony.

clothes and shoes though he did observe traces of cocaine dust on the United States Attorney's table which had come from the sealed bags introduced by the Government and that observation was made from the witness stand. Scharlatt knew of and had used vacuuming techniques to obtain minute particles of narcotics as evidence. (445-446; 444).

#### The Defense Case

The defendants testified to their prior non involvement with the law and detailed an exemplary work record for eight years after their arrival here as refugees from Castro-Cuba. Three character witnesses, Leonard Hetson, President of the Purity Paint Products Cor., Frank Garmendia, a Second Lieutenant in the Army Reserves and Joseph Lima, a Certified Public Accountant, testified that the reputation of the defendants for truthfulness, honesty and veracity was excellent both before they were arrested and after their arrest. (468-549).

The defendants knew Valdez as a person who came to the store as a friend of Urbano Ramos. Ramos ran a fruit store in the same premises where the defendants stored their painting equipment and had equal access to the premises. Although Valdez denied the existence of Ramos and the fruit store (391-393), four witnesses from that neighborhood - two young men, a 69 year old resident of the area and a woman who regularly shopped there for fruit in May of 1972 corroborated the fact that Urbano Ramos did, in fact,

operate a fruit store there. (559-580). Further corroboration was provided by defendants' Exhibit K, an application made by Urbano Ramos dated April 21, 1972 for a certificate of authority to collect New York State Sales Tax in connection with the operation of a retail fruit and vegetable business. (590-594). After May 25, 1972, the date of the arrest, Urbano Ramos was not seen again in the neighborhood and the store was not used again as a retail fruit and vegetable store. (559-589).

Bruzon and Morell testified that on the day of their arrest, Valdez had come to the store looking for Ramos and was met at the door by Morell who stated that he did not know Ramos' whereabouts. Valdez proceeded downstairs to the basement and Morell remained upstairs. Valdez asked Bruzon whether he had seen Ramos and Bruzon answered no. During a period of 15 or 20 minutes that Valdez remained in the front of the basement, Bruzon cleaned his paint brushes and rollers in another portion of that basement where his view of the front was impeded by ladders, paint and garbage cans. Valdez then went upstairs where Morell still was working. Morell walked outside the store in front of the entrance and Valdez proceeded to the trunk of his car which was parked at the curb. <sup>6</sup> (479-548).

Morell went back inside the store. Valdez then walked slowly towards the store after having taken the black attache case out of the trunk which "was the signal that he had seen the cocaine, and we should come in and arrest the defendants." (421).

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6. Although Valdez testified that Morell accompanied him to the trunk of the car, Agent Scharlatt corroborated Morell's testimony that he did not accompany Valdez to the trunk of the car. (433).

According to Morell, the door was then pushed in and Valdez walked in with agents behind him at which time Morell was arrested. Bruzon, who was downstairs in the basement, heard someone coming down the stairs and saw two men with khaki pants and dirty clothes with guns drawn. At the time he was taking the garbage out of the rear of the basement and was about to open the door to the back yard. In fear of his life, he attempted to go out the back but stopped after two or three steps outside the door when he was told by two agents positioned in the backyard to stop right there or they'd kill him.

Defendants introduced a red card (Exhibit I) which they used in 1972 as a business card. That card did not have the address of the paint store 90-91 31st Avenue, Queens, New York, but the address 18-10 21st Avenue. (497-499). Valdez had described a white or green card given to him by the defendants with the store address on it. He stated he had given it to Agent McElroy. The Government did not have the card and Agent McElroy did not testify. (377-378).

Morell's wife testified that on May 24, 1972, she and her husband spent the evening at her mother's house in Queens celebrating her birthday - May 24th. They did not arrive home until approximately 2A.M. the morning of the 25th. She directly contradicted Valdez' testimony that he had been at Morell's apartment the evening of the 24th to discuss the purchase of the

cocaine. Valdez did not describe Morell's apartment and a search of the apartment, consented to by Morell's wife, after his arrest, disclosed no evidence of drugs. (595-597).

The Prosecutor's Summation

In the main, the Government sought to buttress Valdez' credibility on summation and seriously misled the jury.

"We know that Valdez was convicted of a crime. We know that in 1969 he possessed cocaine. He testified that he started to cooperate with the Government sometime thereafter. We know that at the time this case occurred in 1972, Valdez was under no compulsion to cooperate with the Government --

MR. SLOTNICK: We don't know that. The evidence points both ways. As Your Honor indicated, he got three years probation in May of 1971.

THE COURT: There was no testimony either way.

MR. KAPLAN: He testified there were no threats or promises and he was already sentenced, no pending cases. There were no arrests." (623-624).

. . .

MR. KAPLAN: There is no reason for this man to fly up to New York from Central America. Have they shown you a reason or motive for this man to lie? We'll talk about the defendants' motives a little later on.

Why should he come up here and make a trip like that? There are no promises or threats hanging over his head." (629).

. . .

"Again, remember there were no promises, payments, nothing. No pending cases. There was nothing for that man to lie about. There were no inducements. You have to consider that. They are calling the man a liar. Why? He is coming up from Central America. It's not even in our jurisdiction --

MR. SLOTNICK: Objection to that. There are extradition proceedings.

THE COURT: No, no. It's not our country -- period.

Disregard the statement made by counsel." (830-831).

### The Search

On February 27, 1974, the Trial Court held a hearing to determine whether cocaine seized on May 25, 1972 as a result of a warrantless search of the premises, 90-19 31st Avenue, Queens, New York, should be suppressed. The entire testimony of that hearing is contained at pp. 3-50 of the Appendix. Special Agent Jeffrey Scharlatt was the only witness.

A few days prior to May 25, 1972, Scharlatt learned from Agent McElroy that an arrest and seizure of cocaine was to be made at the premises pursuant to an undercover investigation by Alfredo Valdez. On May 25, at approximately 1:00 P.M., Valdez arrived at B.N.D.D. offices in Westbury, Long Island located in the same building and on the same floor as the District Court.

Valdez was known to Scharlatt to be a reliable informer having

provided information in the past which resulted in arrests, convictions and seizures of drugs in six or eight other cases. He informed Scharlatt that he had arranged to purchase four kilos of cocaine from the defendants for \$48,000. Scharlatt provided the Government funds which were on hand and organized a ten agent team to effectuate the arrest and contemplated seizure. Scharlatt knew he was going to a store which was not open to the public but was used for the storage of painting supplies by the defendants.

At approximately 3:40 P.M. that day, without search or arrest warrants, Scharlatt, his team of agents and Valdez arrived at the location. The agents set up surveillance around and in back of the store. Scharlatt stationed himself across the street from the entrance approximately 150 feet away. Valdez parked his car close to the entrance, knocked on the door which was opened by the defendant, Morell, and entered the store. Thirty minutes later, Valdez exited the store with the defendant, Morell, who remained outside the entrance as Valdez walked to the trunk of his car which contained the \$48,000 in an attache case. Morell turned and walked back into the store and Valdez removed the case from the trunk. When the case was removed, Valdez, according to prearrangement, walked slowly toward the entrance and the agents proceeded to move towards the store to effectuate the arrest and seizure.

Scharlatt lost sight of Valdez and the doorway while crossing

over to the store-side of the street. Prior to losing sight of the doorway, he did not see Valdez or any other agent enter the store. When he arrived at the doorway, the door was open and four other agents were already inside in control having placed Morell under arrest, taken the attache case containing the money from Valdez and having effectuated a mock-arrest of Valdez.

Valdez shouted "God Damn" - another prearranged signal - meaning the narcotics were in the basement. Scharlatt proceeded downstairs to the basement in search of the defendant, Bruzon, and the narcotics preceded by at least two and possibly three other agents. When he reached the bottom of the stairs, he turned and saw Bruzon at the rear door way going out into the backyard. Someone shouted "Police" and when Scharlatt reached the rear of the basement, he was told Bruzon was arrested. Turning back to return upstairs, Scharlatt saw plastic bags with white powder in them lying under a hammock near the stairs at the front of the basement. He pushed back the hammock and called for an agent who had been ordered to bring a camera to the raid. A picture was taken at the scene and was identified by Scharlatt at the hearing. (Government's Exhibit 1).

Scharlatt could offer no testimony and did not offer any testimony whether the agents who entered the store gave notice of their authority and purpose prior to their entry.

The defendants moved for suppression on two grounds. First, that there was ample opportunity to obtain a warrant and second that the Government had failed to overcome its burden that the agents effectuated entry

into the premises after giving notice of their authority and purpose.

The Trial Court's findings were, at p. 50,

"The Court finds on the basis of the testimony given before it there should be no suppression of the evidence. The testimony is such that there was all probable cause and desirability and it was proper under the circumstances."

### ARGUMENT I

#### FAILURE OF THE GOVERNMENT TO TURN OVER THE DETAILS OF THEIR MAIN WITNESS'S ARREST, PLEA AND SENTENCE DEPRIVED THE DEFENDANTS OF A FAIR TRIAL

The documents and exact details concerning Valdez' arrest and conviction together with conditions of sentence were not made available to the Defense Counsel prior to cross-examination nor thereafter -- even after requests were made. Failure to provide them with this information concerning the prior "bad" history of this unknown-to-them witness was a deprivation of their due process rights.<sup>8</sup>

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8. In the application before the Honorable George Rosling, D.J., presented on September 29, 1972, the Government consented to providing information with regard to unnamed co-conspirators. The Assistant who tried this case said that there were none. Furthermore, in the application placed before the Honorable George Rosling on September 29, 1972, the defendant requested:

"13. ... that the Government and persons who participated in the investigation of the offense charged against the defendants, had information which is favorable to the defense of the moving defendants, including matters which might or could motivate testimony by persons who the Government intends to call during the course of the trial, including acts of misconduct or offenses committed by said persons, and that in order to properly prepare for a defense, it is necessary that all of said information and information requested in the Notice of Motion be made available to counsel for the moving defendants, in addition to any other material favorable to the presentation of the defense of this case."

Furthermore, in the defendant's request for discovery and inspection, he specifically requested:

"... permitting the defendants to inspect and copy or photograph all evidence in the possession, custody or control of the Government favorable to the said defendants."

This application was consented to by the Government on September 29, 1972, in a hearing before the Honorable George Rosling.

Valdez was the only witness produced by the Government linking the defendants to the cocaine which was introduced through him. His credibility was a serious and the major issue for the jury.

The prosecution has claimed that the records sought are not in their possession, but in the possession of the United States Attorney for the District of Florida.

The Government's failure to provide the defense with material within the prosecutor's possession which is favorable to the defendant, after a specific request by defense counsel, is a violation of defendants' constitutional guarantee of due process of law. Brady v. Maryland, 373 U.S. 83 (1963), Giles v. Maryland, 386 U.S. 66, (1967), United States v. Polisi, 416 F. 2d 573, 577-578 (2nd Cir., 1969), United States v. Persico, 339 F. Supp. 1077 (S.D.N.Y., 1972).

There can be no doubt that the Government had the requested information available. United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967). It is the Government who is currently holding the sought after information, and, despite their protestations to the contrary, Valdez' criminal record is uniquely within their control. The fact that the information is in the office of the United States Attorney for the District of Florida rather than the United States Attorney for the Southern District of New York is of no import whatsoever. "The prosecutor's office is an entity (emphasis supplied) and as such it is the spokesman for the Government." Giglio v. United States,

405 U.S. 150 (1972).

This circuit has categorized three distinct types of governmental suppression. United States v. Keogh, 391 F. 2d 138 (2nd Cir., 1968), United States v. Persico, *supra*.

1. Deliberate or Grossly Negligent Suppression - this includes not only conscious decisions by a prosecutor to withhold favorable information, but also failure to disclose those pieces of information so obviously favorable that they could have not been overlooked. Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

2. Withholding Favorable Material upon Request of Defense Counsel - where the request of the defendant serves to put the prosecutor on his guard in order that he may check through his files and submit all pertinent information to the request. United States v. Keogh, *supra*, Brady v. Maryland, *supra*.

3. Withholding Evidence not Clearly Material and for which no Request has been made - we do not deal with this type of suppression in the instant case.

Clearly, the case at bar falls within either of the two first categories. The nature of the suppressed material in 1 or 2 above, is the same, i.e., "favorable to the defense." The difference in the application of the two categories lies in the manner in which the suppressed material comes to, or should have come to, the attention of the prosecution. A request

"... serves the valuable office of flagging the importance of the evidence ... and thus imposes on the prosecutor a duty to make a careful check of his files...". United States v. Keogh, supra, at page 147. The nature of the case can serve the same purpose, e.g. "... the extreme sexual proclivities of the complaining witness of Giles v. State of Maryland ... could scarcely have failed to attract and sustain prosecutorial awareness." United States v. Keogh, supra at page 147. One can readily see that the instant case is close to point, for if the U.S. Attorney, by some strange oversight, did not realize that the credibility of his sole witness might hinge on prior or pending criminal charges, then surely the request by defense counsel during the trial should have "flagged" the Government to that realization and caused the U.S. Attorney to secure the requested favorable material from his colleague in Florida -- or from the Drug Enforcement Administration.

In examining suppression cases, it must be remembered that the interest of the prosecution is irrelevant; prejudice to the defendant is the key. United States v. Brawer, 367 F. Supp. 156 (S.D.N.Y. 1973). "Where suppression of evidence prejudices the defendant in the preparation of his defense and such evidence is shown to be material and of some substantive use to the defendant, the defendant's constitutional rights are violated." United States v. Persico, supra at p. 1090; see also United States v. Polisi, supra, at p. 577; United States v. Tomaiolo, 378 F. 2d 26 (2nd Cir., 1967) cert. denied 389 U.S.

886, 88 S. Ct. 159, 19 L. Ed. 2d 184.

Defendant is now entitled to a new trial.

"A prosecutor's failure to disclose evidence whose high value to the defense could not have escaped him requires a new trial, even where the perjury concerns only the credibility of the witness .... Similarly, 'the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution.' Brady v. Maryland..." United States v. Polisi, supra, at p. 577.

So, defendant will be granted a new trial if the prosecutor's action is deemed 'grossly negligent suppression,' even if the information suppressed only may impeach the credibility of a witness, albeit, the Government's witness.

If the suppression is found to fall within the second category ('favorable to the accused upon request') then the duty of the defense is to satisfy the mandate of Moore v. Illinois:

"The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." Moore v. Illinois, 408 U.S. 786.

The record will show that defense counsel made timely requests for the material. This material was intentionally not produced.

In the light of the peculiar nature of the Government's case, i.e., that the witness whom they refuse to provide favorable information

concerning is their main witness, and "when the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." Giglio v. United States, supra at page . Criminal records have been recognized as material which may come within the purview of Brady.

"As to the criminal records of government witnesses, such information may well be evidence 'favorable to the accused' within the meaning of those terms as expressed in Brady v. Maryland ... See Giles v. Maryland... The impeachment value of a prior criminal record is fully appreciated by the prosecution and its use would be available to both sides of a criminal trial." United States v. Leichtfuss, 331 F. Supp. 723 (D. Ill., 1971).

In a case such as this, where the credibility of the Government's witness should it successfully be impeached, would certainly give rise to a reasonable doubt in the minds of the jury, there is little or no question as to the materiality of the witness's criminal record. "A finding of materiality is required under Brady ... A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury ..." (emphasis added). Napue v. Illinois...". Giglio v. United States, supra. This Court has reworded its interpretation of the Brady mandate, requiring "... a showing that there is a significant chance that the nondisclosed item, developed by skillful counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Fried, slip. op. October 12, 1973, no. 133, Per Curiam at p. 123. See also United States

v. Houle, slip. op. December 13, 1973, nos. 424-426 at p. 989.

In examining the materiality of evidence for the purposes of granting the defendant a new trial, one must always keep in mind the seminal influence of Brady v. Maryland:

"In Brady v. Maryland, supra, the Supreme Court gave a new direction to the suppression cases by looking to the interest of the defendant rather than the prosecution's motive, stressing that the accused's facilities to gather evidence are usually meager in comparison to those of the state. When the prosecutor aggravates defendant's lack of ability to obtain evidence by not revealing to him material evidence the Constitution is violated.

The importance of Brady, then, is its holding that the concept out of which the constitutional dimension arises in these cases, is prejudice to the defendant measured by the effect of the suppression upon defendant's preparation for trial rather than its effect upon the jury's verdict." United States v. Polisi, supra, at p. 577.

A great number of decisions recognize that the defense is not as adept in gathering information as the prosecution, and that this imbalance causes the Government to shoulder a greater duty towards the disclosure of favorable evidence within its possession and control. See United States v. Persico, supra at p. 1089, Simos v. Gray, 356 F. Supp. 265, 269 (D. Wisc., 1973) and cases cited therein.

The motion of the defense, both pre-trial and at trial, was a proper and timely one for the type of information requested. Brady material should have been presented at the trial. See United States v. Anzelmo, 319 F.

Supp. 1106 (D. La., 1970), United States v. Withers, 303 F. Supp. 641 (D. Ill., 1969). The proper time to ask for and receive information such as that requested is at trial. "As for exculpatory material, the Government's responsibility arises at trial, after the issues and the Government's proof have crystalized." United States v. King, 49 F.R.D. 51, 53 (S.D.N.Y., 1970); see also United States v. Dioguardi, 332 F. Supp. 7, 16 (S.D.N.Y., 1971).

Undoubtedly the finest statement on suppression of favorable evidence comes from Mr. Justice Fortas in an Addendum to his concurring opinion in Giles v. Maryland:

"A criminal trial is not a game in which the State's function is to outwit and intrap its quarry. The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense-regardless of whether it relates to testimony which the State has caused to be given at trial - the State is obliged to bring it to the attention of the Court and the defense." Giles v. Maryland, supra at p. 100.

"In my view, a supportable conviction requires something more than that the State did not lie. It implies that the prosecution has been fair and honest and that the State has disclosed all information known to it which may have a crucial or important effect on the outcome." Giles v. Maryland, supra. at p. 101.

The Government was very careful to indicate that there were no co-conspirators.<sup>9</sup> The first discovery of the informant, Valdez, together with his real name occurred at the trial. When defense counsel requested

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9. As evidenced by their responses to the Bill of Particulars.

information concerning Valdez' arrest, conviction and eventual cooperation with the Government -- which brought upon his motivation to testify as all the facts bear out herein -- defense counsel was denied access to said documents. Defense counsel was not only caused to probe on cross-examination into an area that was unknown to him, but was further hampered as a result of the fact that the witness, Valdez, did not recall the details of his plea and sentence.

A complete reading of Valdez' testimony will indicate that there were highly inconsistent comments by him with regard to his activities and also with regard to the prior arrest and conviction. Defense counsel could not adequately develop these aspects of his background with regard to credibility and motivation as he did not have the proper documents before him indicating what the arrest was for, when it occurred and what the facts and circumstances surrounding said arrest were. Certainly, an arrest, conviction and cooperation by a man who is alleged to be a valuable informant are not ed down in Government reports and should be available for counsel for the purposes of cross-examination. Especially when the Government has had two years to prepare for trial. When counsel requested same, the Government responded that Valdez' record was public property and counsel could receive them. Obviously, when counsel has suddenly discovered the identity of a witness, kept concealed by the Government, when counsel has no knowledge of his prior

background nor that he had any connection with Florida, counsel should not be caused to lose the opportunity to question with regard to his prior background due to the non-production of such evidence by the Government. The mere fact that this was declared to be public record by the Government does not make it any less Brady material. That this was available to the Government, that the Government had this indictment pending for two years, should have caused the assistant to properly prepare and have those papers available. Another interesting note, is the fact that the agent who obtained the cooperation of Valdez, in this case and "others", <sup>10</sup> sat at the table and did not testify. Certainly Agent McElroy had these reports available to him in his file, or was able to obtain copies therefrom from the BNDD in Florida, or the United States Attorney's office therefrom. Defendants should not have been caused to continue the trial without this effective tool of cross-examination. Especially, in view of the age of the case and total lack of corroboration of the aforementioned witness. It is further highlighted by the fact that the defendants testified and presented defenses which bordered on a question of credibility and the information as received by defense counsel may have been important enough to have given the defendants the benefit of the doubt. Needless to say, it was essential to attempt to discredit the Government informant -- without these papers the defendants were caused to go on a fishing expedition during cross-examination.

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10. There was some nebulous testimony with regard to other cases which could not have been developed again, due to lack of proper material and reports possessed by the Government but not turned over to the defense counsel.

Accordingly, the judgment below should be reversed and a new trial ordered.

## ARGUMENT II

### THE PROSECUTOR'S SUMMATION WAS IMPROPER AND TESTIMONIAL IN NATURE THEREBY PREJUDICING THE DEFENDANTS AND REQUIRING A NEW TRIAL

The prosecutor's summation sought naturally to buttress the testimony of Valdez and in attempting to do so, misstated the evidence by saying that Valdez came from Central America to testify at the trial of these defendants voluntarily without threat, promise or under compulsion of the Government. That misrepresentation is grounds for a new trial.

United States v. Drummond, 481 F. 2d 62 (2nd Cir., 1973), (Garris v. United States, 390 F. 2d 862 (D.C. Cir. 1968), United States v. Newman, 490 F. 2d 139 (3rd Cir., 1974).

After refusing to disclose the complete circumstances of Valdez' arrest, plea and sentence (see Point I, *supra*), the prosecutor then capitalized on the absence of any evidence of Government pressure on Valdez. Valdez could not remember when he was sentenced and the three year probationary period to which he was sentenced sometime in 1971 may not have been terminated. The threat of violation of probation could have been a significant factor in the jury's determination of his credibility upon which the conviction below so heavily rests. The jury could have made an assumption that Valdez was testifying favorably for the Government in return for an early termination of probation or in fear of its revocation. The prosecutor's summation unfairly undermined any such assumption. Cf. United States v. Newman, *supra*. Rather than

submit its assertions regarding Valdez' freedom from Government compulsion to adversarial challenge, the Government insulated its assertions within the United States Attorney's summation thereby prejudicing the defendants.

In United States v. Newman, the Court stated:

"To support Nee's testimony that he had served as a witness without 'threats or promises or inducements', the prosecutor stated to the jury: 'Our office has nothing to do with that. We could not and would not deal with Mr. Nee. He pleaded guilty.' (Tr. 563-564). The Government concedes that the above represents 'testimony', but argues that its effect was not prejudicial because 1) the jury knew that sentencing was within the Judge's prerogative and 2) cautionary instructions were given to the jury.

The Government's arguments are not persuasive. Had the U.S. Attorney believed that the jury actually understood the sentencing process, he would not have made the statement in the first place. It is more likely that the U.S. Attorney offered the comment in order to support the damaged credibility of the Government's prime witness, Thomas Nee. A juror listening to Nee may well have discredited his testimony on the assumption that Nee had received a deal in return for a guilty plea and service as a witness. The 'testimony' by the prosecutor undermined this assumption, and thereby prejudiced the defendant. When a prosecutor misstates facts in his closing remarks or states facts outside of the record in such a way as to prejudice a defendant, a new trial is required." \*\*\* (Id. at 146-147).

The Government may not urge that no prejudice could have ensued because of the strength of its total case. First, the defendants testified and produced character witnesses in their support and the defendant, Morell, produced

an alibi witness in connection with a meeting supposedly had between him and Valdez. Moreover, the emphasis placed by the prosecution upon the non-testimonial facts in his summation indicated his high appraisal of their importance:

"His own estimate of his case, and of its reception by the jury at the time, is, if not the only, at least a high relevant measure now of the likelihood of prejudice." Garris v. United States, *supra*, at 866.

Moreover, as this Circuit has said in United States v. White, 486 F. 2d 204, the prosecutor's conduct must be viewed "in the context of the entire trial." In the context of this trial where the credibility of Valdez was the supportive truss of the Government's case, the prosecutor's bootstrapping of his witness by non-factual assertions rose to the level of improper and prejudicial conduct sufficient to deny the defendants a fair trial.

Furthermore, the trial court did not as in United States v. Pfingst, 477 F. 2d 177 (2nd Cir., 1973), dispel the prejudice by strong curative instructions. Instead, the prosecutor was allowed three times during a short summation to assert over objection that there was no Government compulsion which could influence Valdez' testimony. Accordingly, the judgment should be reversed and a new trial ordered.

### ARGUMENT III

#### THE WARRANTLESS SEARCH OF DEFENDANTS STORE MADE AFTER ENTRY TO THE PREMISES WAS GAINED WITHOUT PRIOR NOTICE OF THE AGENTS' PURPOSE AND AUTHORITY REQUIRED SUPPRESSION OF THE SEIZED NARCOTICS

Agent Scharlatt, the sole witness at the suppression hearing, knew that he was going to the defendants store to make an arrest and to seize evidence at least two days prior to the seizure. Since, a "warrantless search is per se unreasonable" Coolidge v. New Hampshire, 403 U.S. 443 (1971), the government was bound to establish circumstances justifying their failure to secure a warrant.

The government's contention in the trial court was that this was a "plain view" situation. However, this rationale does not excuse the entry into the premises without the warrant, and the subsequent search or "plain view" seizure cannot justify the initial illegality.

"The belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." Agnello v. United States, 269 U.S. at 33.

Even assuming probable cause existed herein, it existed for a period sufficiently long for the agents to secure a warrant. Moreover, they made arrangements for the seizure at their offices which were on the same floor as the District Court in Westbury.

If the "discovery is anticipated", Coolidge, supra 403 U.S. 466, the warrantless search must fall. Cf. People v. Spinelli, 35 N.Y. 2d 77 (1974). There was ample time to secure a warrant to make the significant intrusion into defendants' premises which was made here. Enforcement of the rule put forth herein will not make effective law enforcement more burdensome. And even if securing a warrant is more burdensome, that factor alone is insufficient to justify a warrantless search. McDonald v. United States, 335 U.S. 451.

Neither is probable cause sufficient to justify entry of a building without notice of the officers' purpose and authority. Miller v. United States, 357 U.S. 301 (1958); United States v. Manning, 448 F. 2d 992 (1971); 21 U.S.C. § 879.; 18 U.S.C. § 3109.

Even if probable cause exists for the arrest of a person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home with or without an arrest warrant, except

- (1) where the persons within already know of the officers' authority and purpose, or
- (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or
- (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

Kev v. California, 374 U.S. 47 (1963).

Sabbath v. United States, 391 U.S. 585 (1968), reversed a conviction where agents made no prior announcement of their authority and purpose prior to entering through an unlocked door of an apartment, although the informer

in Sabbath was in the apartment giving at least some ground for the government to argue that compliance with § 3109, would have endangered his life. That argument, although recognized by the Supreme Court, in general, to be an exception to the rule of announcement, was nonetheless insufficient, absent substantial basis for assuming the defendant was armed or might resist arrest or that the informer was in any danger.

21 U.S.C. § 879 codifies the exceptions to 18 U.S.C. § 3109 recognized in Miller, Ker and Sabbath. The mere codification of the exceptions does not however relieve the government of the burden to comply with § 3109.

Tested against the language of Miller or Ker, the facts of Sabbath or the codified exceptions of § 879, the entry below cannot stand scrutiny. The government's only witness testified that the defendant Morell entered the store and as Valdez walked toward the door he crossed the street and went toward the entrance. When he last saw the entrance no agent had reached the door. Upon arrival at the entrance the door had been opened and the agents were already in the store with Morell under arrest. The government offered no testimony whatever that an announcement of purpose and authority was ever made prior to entry. Its justification was that Valdez was inside therefore notice was unnecessary, the very argument rejected in Sabbath by the Supreme Court because it was based not on specific facts but on a generalized policy.

"The Government seeks to invoke an exception to the rule of announcement, contending that the agents' lack of compliance with the statute is excused because an announcement might have endangered the informant Jones or the officers themselves. (... citing cases) However, whether or not "exigent circumstances," *Miller v. United States*, supra, 357 U.S. at 309, 78 S.Ct. at 1195, would excuse compliance with § 3109, this record does not reveal any substantial basis for excusing the failure of the agents here to announce their authority and purpose. The agents had no basis for assuming petitioner was armed or might resist arrest, or that Jones was in any danger. Nor, as to the former, did the agents make any independent investigation of petitioner prior to setting the stage for his arrest with the narcotics in his possession." Sabbath, supra at 591.

It is also clear from the testimony below that the agents made no independent investigation of the defendants prior to setting the stage for their arrest. No independent observations were made by agents and the entire raid was based upon the word of the paid informer Valdez.

Whether the defendants would "have behaved one whit differently if the agent had uttered a few ... words" United States v. Manning, supra at 1002, is a significant question, since the government commented upon Bruzon's running from the agents as evidence of a consciousness of guilt. Bruzon testified that he ran because he was in fear of the strangers who appeared in dirty clothes with guns drawn and that when someone shouted "Police" he stopped. Agent Scharlatt corroborated the fact that he stopped after the word "Police" was shouted. So we do deal here with a case of error affecting substantial rights Cf. United States v. Manning, supra.

Accordingly, the evidence seized as a result of the search should be suppressed and the indictment dismissed.

#### ARGUMENT IV

**THE GOVERNMENTS FAILURE TO IDENTIFY,  
PRODUCE OR DISCLOSE THE WHEREABOUTS  
OF A CONFIDENTIAL INFORMER WHO PAR-  
TICIPATED IN THE ALLEGED CONSPIRACY  
REQUIRES A NEW TRIAL.**

The testimony clearly showed that "Louie" was a witness to the initial conversation which hatched the alleged conspiracy. He introduced Valdez to the defendants as "big guys" in the business after he had been asked by Valdez to find people from whom Valdez could purchase cocaine. When counsel objected to any statements of "Louie" the Court sustained the government's position that they were made in the presence of the defendants and were therefore admissible.

Prior to trial the defense had requested the names of other coconspirators. The government represented that there were none. Valdez and "Louie" therefore were agents of the government. This was confirmed by the Assistant United States Attorney's refusal to reveal the whereabouts of "Louie" on the ground that he was a confidential informant. During the trial defense counsel's request for "Louie" was again refused by the Court on the ground that "Louie" had nothing to do with the transaction. This was error in view of the fact that "Louie" was the only third person who could corroborate or contradict Valdez' testimony that his relationship with the defendants was narcotics connected. Agent McElroy who might have corroborated part of Valdez' testimony concerning receipt of a

business card at that first meeting containing the address of the store was not called to testify whether or not he had in fact received that card from Valdez.<sup>11</sup>

The defendants testimony regarding their relationship with Valdez as innocent could not be corroborated by "Louie" who might have testified that the meeting described by Valdez never took place.

Roviaro v. United States, 353 U.S. 53 (1957) compels a reversal herein. The Roviaro decision pointed out that the informer's "possible testimony was highly relevant" that "he might have disclosed an entrapment" and "might have testified to petitioner's lack of knowledge". (Emphasis added).

Although the conversation in "Louies" presence did not take place at the time of the alleged commission of the substantive offense, Morell's possession hinged on his presence in the store (but not in the basement where the drugs were found) and Valdez' testimony, denied by Morell, that they had spoken about the sale of the narcotics. Bruzon's possession similarly rested upon evidence of his presence in the basement and Valdez' testimony, denied by him, that he actually

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11. The government did not produce the card and the defendants introduced their business card of red color -- not green or white as Valdez had described it -- which did not contain the address of the store.

handled and mixed the cocaine pursuant to their prior discussions, to which "Louie" was a witness.

CONCLUSION

FOR THE ABOVE STATED REASONS,  
THE JUDGMENT BELOW SHOULD BE  
VACATED AND THE INDICTMENT DIS-  
MISSED OR, IN THE ALTERNATIVE,  
A NEW TRIAL ORDERED.

Respectfully submitted,

BARRY IVAN SLOTNICK  
Attorney for Defendant, Morell  
Office & P.O. Address  
15 Park Row  
New York, N.Y. 10038

GEORGE L. SANTANGELO  
Attorney for Defendant, Bruzon  
Office & P.O. Address  
253 Broadway  
New York, N.Y. 10007

STATE OF NEW YORK )

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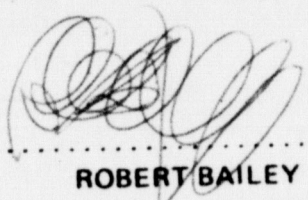
COUNTY OF RICHMOND )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 11 day of Nov. 1974 deponent served the within Brief upon M. J. Attorneys

attorney(s) for Appellee

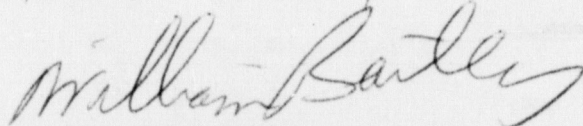
in this action, at 225 Adman Plaza East  
Brooklyn, NY

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

  
ROBERT BAILEY

Sworn to before me, this

11 day of Nov 1974



WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976